

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. V-08/09-473
)
 Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department for Children, Family Services Division, to substantiate petitioner for physical abuse of his son, G.M.

The petitioner filed for fair hearing on or about August 10, 2009. A series of telephone status conferences were held. During the January 27, 2010 conference with counsel, the Department stated its intention to seek summary judgment based on collateral estoppel. A briefing schedule was made.

The Department filed a Motion for Summary Judgment based on collateral estoppel. Petitioner did not file a response to the Department's Motion.

The claim for collateral estoppel is based on an Order from a contested Relief from Abuse Action in which the Family Court found that petitioner's actions met the definition of abuse found in subchapter 2 of chapter 49 of Title 33 (33 V.S.A. §§ 4911 et seq.). The issue is whether the findings of the Family Court are binding on the Board as a matter of collateral estoppel.

DISCUSSION

The petitioner and J.MacD. are the parents of two children, G.M. and A.M. The parents have been separated for several years. During November 2008, the petitioner had custody of the children and J.MacD. had visitation rights pursuant to a Family Court Order in their parentage case. G.M. was four years old then. When J.MacD. exercised her visitation rights on November 14, 2008, she found that G.M.'s buttocks were bruised. J.MacD. called law enforcement who, in turn, contacted the Department.

Once the Department received a report of abuse to G.M., they were required by statute to investigate the report of child abuse. 33 V.S.A. §§ 4914 and 4915. The Department is also required to maintain a registry of all investigations unless the reported facts are unsubstantiated. 33 V.S.A. § 4916.

The pertinent sections of 33 V.S.A. § 4912 define abuse and harm as follows:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually

abused or at substantial risk of sexual abuse by any person.

(3) "Harm" can occur by:

(A) Physical injury or emotional maltreatment;

. . .

(6) "Physical injury" means death, or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means.

When J.MacD. learned in February 2009 that the Department substantiated petitioner for physical abuse, she filed an action for Relief from Abuse on behalf of her children. The final Order from that action is the basis of the Department's Motion for Summary Judgment.

The Department filed a Statement of Material Facts Not in Dispute. Because the petitioner did not contest these facts, they are the facts before the Board. V.R.C.P. 56, Fair Hearing No. Y-01/09-28.

The Statement of Material Facts Not In Dispute is:

1. On December 31, 2008, the Department for Children and Families (DCF) substantiated petitioner for physical abuse of his son G.M. in November of 2008. Exhibit A, Notice of Substantiation and Intent to Place Name on Registry.¹

2. On February 12, 2009, the mother of G.M., [J.MacD.] filed a complaint for relief from abuse [Exhibit B] requesting an ex parte order and final order of relief

¹All Exhibits mentioned in the above Statement are attached to the Department's pleading but will not be duplicated here.

from abuse on behalf of G.M., and his sister, A.M. The court denied the request for an ex parte order on February 12, 2009 [Exhibit C]. The complaint for relief from abuse with respect to G.M. was based on the same incident for which DCF substantiated petitioner.

3. On February 27, 2009, hearing was held before Acting Judge [P.M.] in Lamoille Family Court on mother's request for a final order of relief from abuse. At the hearing, mother renewed her request for a final order of relief from abuse and petitioner voiced his objection to such the order. Transcript [Docket No. 15-2-09Lefa, exhibit D}. Based on the positions of the parties the court conducted an evidentiary hearing.

4. At the hearing Mother testified under oath that on November 14, 2008, after picking her children up at petitioner's, she noticed that G.M. had "substantial" bruising on his rear. Mother submitted pictures of the bruising to the court as evidence. Mother stated that the bruising at the time the pictures were taken were two-days old and lasted two days longer after that "if not longer." [Exhibit D].

5. Petitioner testified that he indeed kicked G.M. in the rear but that he did not intend to cause bruising. [Exhibit D].

6. Based on the evidence, the court made a finding that "there was physical harm caused to G.M." and issued an order that petitioner "refrain from abusing the minor children." [Exhibit D and Exhibit E, Order of Protection]. The court noted that in order to issue a relief from abuse order the court had to find physical injury as defined in Chapter 49 of Title 33. [Exhibit D].

7. On July 9, 2009, [t]he parties stipulated to the dismissal of the relief from abuse order. [Exhibit F].

Although the petitioner has not filed a response to the Department's Motion, the Board needs to determine whether collateral estoppel applies.

The Board has long recognized the doctrine of collateral estoppel and has relied on the test articulated in Trepanier v. Styles, 155 Vt. 259, 265 (1990), to determine whether the Board is precluded by the findings in a prior court proceeding from making its own findings in an case. In re P.J., 2009 VT 5 (2009) affirming Fair Hearing No. 20,854. See Fair Hearing Numbers 11,444; 13,432; 20,476 and Y-01/08-05.

The Trepanier ruling set out the following criteria at page 265:

- (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action;
 - (2) the issue was resolved by a final judgment on the merits.
 - (3) the issue is the same as the one raised in the later action.
 - (4) there was a full and fair opportunity to litigate the issue in the earlier action; and
 - (5) applying preclusion in the action is fair.
- See also Alpine Haven Property Owners Assn., Inc. v.

Deptula, 175 Vt. 559 (E.O. 2003).

In this matter, the petitioner was a party to a Family Court proceeding arising from the same incident that the Department substantiated. The Abuse Prevention Act incorporates the definitions used by the Department in

substantiation cases when an action is brought on behalf of a minor child. 15 V.S.A. § 1101(1)(C).

A final decision on the merits was reached after a contested evidentiary hearing. The petitioner admitted that he kicked G.M. on his behind to discipline G.M.

The issue before the Family Court is the same issue that is now before the Board; namely, whether the petitioner's actions constituted physical abuse to his son under the definition of physical abuse at 33 V.S.A. § 4912.

The fourth and fifth Trepanier are generally considered together. In re P.J., supra. The petitioner had a full and fair opportunity to litigate the issue in the Family Court. The Family Court was cognizant that a finding of abuse could only be found if petitioner's actions met the definition of physical abuse in 33 V.S.A. § 4912. The Family Court found the evidence met the criteria for physical abuse. Collateral estoppel is a tool that protects judicial resources and guards against inconsistent determinations. It cannot be concluded that applying the decision found by the Family Court is unreasonable or unfair.

Based on the foregoing, summary judgment based on collateral estoppel is appropriate.

ORDER

The Department's Motion for Summary Judgment is granted, and the Department's decision to substantiate petitioner for physical abuse to his son is affirmed.

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